

**ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
ADOPTING AND AMENDING RULES**

- 1 The state of Wisconsin department of agriculture, trade and consumer protection adopts
2 the following order to repeal ATCP 35.04(6) and 35.06(5); to renumber 35.03(1)(a),
3 35.08(6), 35.16(7) and 35.22(4)(c) and (d); to amend ATCP 35.14(5), 35.16(9)(intro.); to
4 repeal and recreate ATCP 35.04(5), 35.14(13), 35.22(1) and (2) and 35.28; and to create
5 ATCP 35.03(1)(b), 35.08(6), 35.16(7)(b) and 35.22(5) and (6); relating to the agricultural
6 chemical cleanup program.

**Analysis Prepared by the Department
of Agriculture, Trade and Consumer Protection**

Statutory Authority: ss. 93.07(1) and 94.73(11), Stats.
Statute Interpreted: s. 94.73, Stats.

The Department of Agriculture, Trade and Consumer Protection (DATCP) currently administers an agricultural chemical cleanup program under s. 94.73, Stats. This program is designed to clean up spills of agricultural chemicals and minimize environmental contamination. Under this program, DATCP may reimburse a portion of the eligible cleanup cost.

DATCP has adopted rules, under ch. ATCP 35, Wis. Adm. Code, to govern this program. This rule modifies current rules. Among other things, this rule implements statutory changes enacted in 2003 Wis. Act 33 (biennial budget act).

Rule Contents

Landspreading Soil from Cleanup Sites

In appropriate cases under current rules, a cleanup operation may include landspreading of soils contaminated with spilled fertilizers or pesticides. Landspreading may reduce the concentration of the fertilizer or pesticide, and may provide an economical and potentially useful disposal option.

This rule clarifies that a person who landspreads soil contaminated with a pesticide is, for purposes of pesticide applicator licensing and certification, engaged in the application of that pesticide. The person must be licensed and certified to spread the pesticide-contaminated soil, to the same extent as if the person were applying the pesticide.

Costs to Remove Existing Structures

In some cases, it may be necessary to remove existing structures in order to clean up a spill site. Current rules generally prohibit DATCP from reimbursing costs incurred for the removal of existing structures. But DATCP may reimburse costs to remove certain concrete or asphalt structures (containment structures, parking areas, roadways, curbs and sidewalks) if DATCP pre-approves the removal after finding that the removal is less expensive than other cleanup alternatives.

Under current rules, DATCP may also reimburse costs to remove and reinstall certain movable structures or equipment, or to replace certain fixtures (such as fences and utility lines) that were in good operating condition when removed for the cleanup.

This rule changes and clarifies the current rules. Under this rule, DATCP may reimburse all the following:

- Costs to remove *any* concrete or asphalt (not just the concrete or asphalt structures identified in the current rules) if DATCP pre-approves that removal after finding that it is less expensive than other cleanup alternatives. Under this rule, as under current rules, DATCP may reimburse the depreciated value of the concrete or asphalt, as well as the costs of removal and disposal. However, DATCP may not reimburse the cost of replacing the concrete or asphalt.
- Costs to install engineered barriers, to limit infiltration of existing contamination. The responsible person must agree to maintain the barrier at his or her expense.
- Temporary removal and reinstallation of a surface, structure, fixture or equipment item that is removed *intact*, and returned *intact* to its original use and approximate original location.

- The following corrective measures related to fixtures (such as fences and utility lines) that are in good condition and operating adequately when the corrective measure occurs:
 - * Temporary or permanent relocation.
 - * Removal and replacement with a new fixture of the same size and quality, including any upgrade required by law.
 - * Protection during a spill cleanup, through shoring or other methods.

Repeat Spills

This rule authorizes DATCP, in consultation with the agricultural chemical cleanup council, to reduce the reimbursement rate for cleanups of repeat spills. Under this rule, DATCP may reduce the reimbursement rate for a spill cleanup if DATCP has received or paid a reimbursement claim related to a prior spill at the same site.

The presumptive reimbursement rate (reduced rate) is 50%, unless DATCP finds that a larger or smaller reduction is appropriate. In determining the amount of the reduction, DATCP may consider all of the following in consultation with the agricultural chemical cleanup council:

- The type of agricultural chemical discharged.
- The nature, size and location of discharge.
- The similarity between the discharge and prior discharges.
- The number of prior discharges, and the number of prior discharges for which the department has reimbursed corrective action costs.
- The responsible person's apparent negligence, if any.
- Whether the discharge was caused by a law violation.

Alternative Sources of Drinking Water

In some cases, spills of agricultural chemicals may impair drinking water supplies. Current rules prohibit DATCP from reimbursing well replacement costs, except that DATCP may reimburse up to \$20,000 in well replacement costs if DATCP or the Department of Natural Resources (DNR) orders the well replacement.

This rule expands DATCP's authority to reimburse well replacement costs, consistent with legislative changes enacted in 2001 Wisconsin Act 16. Under this rule, DATCP may reimburse up to \$50,000 in costs incurred for any of the following actions ordered by DATCP or DNR:

- Replacement or restoration of private wells.
- Connection to alternative water sources, whether public or private.

Contractor to Disclose Identity of Landspreading Subcontractor

Current rules require contractors to disclose certain information in bids for cleanup services. This rule requires a contractor to disclose, in every bid that includes landspreading services, the name of the subcontractor (if any) who will provide those services.

Noncompetitive Bids

Under current rules, if DATCP finds that a bid for cleanup services is unreasonable, or that the cleanup service is unnecessary, DATCP may disapprove the bid, require additional bids or reimburse a lesser amount. This rule authorizes DATCP to take the same actions if DATCP finds that bids appear to be noncompetitive.

Payment Schedule

Under current rules, DATCP must pay cleanup reimbursement claims in installments if the cleanup fund balance is less than \$1 million. DATCP may pay an initial installment of up to \$50,000. DATCP may not make any additional payment to a claimant in any fiscal year until DATCP has paid initial installments to all eligible claimants in that year. This may delay full reimbursement to some claimants, even when adequate funds are available to pay all eligible claimants. DATCP must pay interest on any delayed payments.

This rule changes the current method of payment. Under this rule, DATCP may pay the full amount of reimbursement claims on a first-come, first-served basis (there is no \$50,000 installment limit). This will allow DATCP to pay claims more quickly, and limit interest costs to the agricultural chemical cleanup fund.

Reimbursement Rate

Under current rules, DATCP reimburses 80% of eligible cleanup costs. There is a minimum cleanup cost "deductible" of \$3,000 or \$7,500 (depending upon the type of business doing the cleanup), and DATCP does not reimburse costs to the extent that they exceed \$400,000.

This rule reduces the current reimbursement rate, consistent with legislation enacted in 2003 Wisconsin Act 33. Under this rule, DATCP will reimburse 75% of eligible cleanup costs incurred on or after January 1, 2004. There will still be a minimum cleanup cost "deductible" of \$3,000 or \$7,500 (depending upon the type of business doing the cleanup). DATCP will still not reimburse costs to the extent that they exceed \$400,000.

Repeal of Obsolete Provisions

This rule repeals obsolete retroactivity provisions related to reimbursement claims filed with the department prior to November 1, 2000.

Federal and Surrounding State Programs

Federal Programs

There are no comparable federal programs to reimburse agricultural chemical contamination cleanup costs.

Minnesota

The Minnesota Department of Agriculture administers a program to clean up agricultural chemical contamination sites. Agricultural chemical dealers pay fees to finance the fund. Minnesota reimburses up to 80 percent of eligible cleanup costs between \$1,000 and \$350,000 (60% if there is re-contamination). Minnesota pays reimbursements on a first-come first-served basis.

Minnesota does not require a competitive bidding process for contractors, and does not reimburse costs for alternative water supplies. Concrete removal costs are eligible for reimbursement. Minnesota authorizes landspreading of contaminated soil in appropriate cases. If the soil is contaminated with a restricted-use pesticide, the landspreader must be a certified applicator.

Illinois

The Illinois Department of Agriculture administers an agricultural chemical contamination cleanup fund. However, the fund may be used only for emergency cleanups, and has been used only once. Illinois has conducted several non-emergency clean ups, but does not reimburse cleanup costs incurred by private entities. Illinois created its fund by imposing a one-time assessment of \$1,500 on agricultural chemical dealers.

Michigan and Iowa

Michigan and Iowa do not have programs to reimburse agricultural chemical contamination cleanup costs.

Business Impact Analysis

This rule affects businesses that spill fertilizers or pesticides, or pay fees to the agricultural chemical cleanup fund. Most spills occur at farm centers, agricultural dealerships and agricultural cooperatives -- the primary entities paying fees to the fund.

Currently more than 360 entities are involved in cleanups that may qualify for reimbursement from the fund. Many of these businesses are “small businesses” as defined in s. 227.114(1)(a), Stats.

Reimbursement rules have a direct impact on the entities seeking reimbursement, and an indirect impact on entities whose fee payments finance the reimbursement fund. Regulation is designed to provide fair reimbursement, while maintaining the fiscal integrity of the fund. This rule makes a number of changes to current reimbursement rules, including the following:

- It reduces the reimbursement rate as provided by statute (2003 Wis. Act 33).
- It streamlines the reimbursement process.
- It increases reimbursement eligibility for certain cleanup costs.
- It reduces reimbursement rates for repeat contamination. Entities may participate in DATCP’s Environmental Partners Program to prevent repeat contamination (and thus reduce future cleanup costs).

This rule will not have a major impact on business. It will reduce spill cleanup reimbursement rates for some businesses, but only to the extent provided by the Legislature in 2003 Wis. Act 33. The reduction will help maintain the financial solvency of the cleanup fund, thereby minimizing fee charges to businesses that contribute to the fund. Businesses will not need additional professional services to comply with this rule.

1 **SECTION 1.** ATCP 35.03(1) is renumbered (1)(a)

2 **SECTION 2.** ATCP 35.03(1)(b) is created to read:

3 ATCP 35.03(1)(b) An individual who landspreads soil containing a pesticide is
4 deemed, for purposes of licensing and certification under ss. ATCP 29.25 to 29.27, to be
5 applying that pesticide.

6 **SECTION 3.** ATCP 35.04(5) is repealed and recreated to read:

7 ATCP 35.04(5) Costs for any of the following corrective measures that the
8 department specifically requires, or that the department specifically pre-approves in
9 writing after finding that the measures are less expensive than the available alternatives:

10 (a) Removal and disposal of concrete or asphalt. The department may not

1 reimburse costs for the removal or disposal of concrete or asphalt installed after January
2 1, 1998 unless the responsible person proves to the department, by credible laboratory
3 tests, that the construction site was free of agricultural chemical contamination when the
4 concrete or asphalt was installed. The cost to remove concrete or asphalt may include its
5 depreciated value calculated as the original construction cost less all depreciation claimed
6 to date by any person for tax purposes.

7 (b) Installation of an engineered barrier to limit infiltration of existing
8 contamination, provided that the responsible person agrees in writing to maintain the
9 barrier at his or her expense until the contamination is removed or fully degraded.

10 (c) Temporary removal and reinstallation of a structure, fixture or equipment item
11 that is removed intact, and returned intact to its original use and approximate original
12 location.

13 (d) The following corrective measures related to fixtures that are in good
14 condition and operating adequately when the corrective measure occurs:

- 15 1. Temporary or permanent relocation.
- 16 2. Removal and replacement with a new fixture of the same size and quality,
17 including any upgrade required by law.
- 18 3. Protection during a corrective action, through shoring or other methods.

19 **SECTION 4.** ATCP 35.04(6) and 35.06(5) are repealed.

20 **SECTION 5.** ATCP 35.08(6) is renumbered (7).

21 **SECTION 6.** ATCP 35.08(6) is created to read:

1 ATCP 35.08(6) RECONTAMINATION; REDUCED REIMBURSEMENT RATE. (a) The
2 department, after consulting with the agricultural chemical cleanup council, may reduce
3 the reimbursement rate for a corrective action related to a discharge discovered after
4 *[revisor inserts effective date of this subsection]* if the department has received or paid a
5 reimbursement claim related to a prior discharge at the same discharge site.

6 (b) The presumptive reimbursement rate under par. (a) is 50%, unless the
7 department finds that a different rate is appropriate. In determining the appropriate
8 reimbursement rate, the department may consider all of the following in consultation with
9 the agricultural chemical cleanup council:

- 10 1. The type of agricultural chemical discharged.
- 11 2. The nature, size and location of discharge.
- 12 3. The similarity between the discharge and prior discharges.
- 13 4. The number of prior discharges, and the number of prior discharges for which
14 the department has reimbursed corrective action costs.
- 15 5. The responsible person's apparent negligence, if any.
- 16 6. Whether the discharge was caused by a law violation.

17 **NOTE:** See s. ATCP 35.12(8), which prohibits the department from reimbursing
18 any costs for corrective actions made necessary by intentional or grossly
19 negligent violations of law.

20 **SECTION 7.** ATCP 35.14(5) is amended to read:

21 ATCP 35.14(5) Costs to construct, repair, replace, improve, relocate or demolish
22 any structure, equipment or fixture, except as provided under s. ATCP 35.04(5) ~~and (6)~~.

23 **SECTION 8.** ATCP 35.14(13) is repealed and recreated to read:

1 ATCP 35.14(13) The cost of providing alternative sources of drinking water or
2 point-of-use water purification devices, except that the department may reimburse a
3 responsible person up to \$50,000 for any of the following corrective actions if the
4 department or the department of natural resources orders that action in response to a
5 discharge:

6 (a) Replacement or restoration of private wells.

7 (b) Connection to alternative water sources, whether public or private.

8 **SECTION 9.** ATCP 35.16(7) is renumbered (7)(a).

9 **SECTION 10.** ATCP 35.16(7)(b) is created to read:

10 ATCP 35.16(7)(b) A contractor shall disclose, in every bid under sub. (2) that
11 includes landspreading services, the name of the subcontractor who will provide the
12 landspreading services.

13 **SECTION 11.** ATCP 35.16(9)(intro.) is amended to read:

14 ATCP 35.16(9)(intro.) If the department finds that a bid or cost estimate under
15 sub. (2) is unreasonable, that bids or cost estimates appear to be noncompetitive, or that
16 all or part of the contract service is unnecessary, the department may do any of the
17 following:

18 **SECTION 12.** ATCP 35.22(1) and (2) are repealed and recreated to read:

19 ATCP 35.22(1) GENERAL REIMBURSEMENT FORMULA. (a) Except as provided in
20 subs. (2) through (6), the department shall reimburse a responsible person for each
21 discharge site an amount equal to 75% of the eligible corrective action costs that are

greater than \$3,000 and less than \$400,000. To this amount, the department shall add interest costs under s. ATCP 35.25.

(b) If no more than \$3,000 of the eligible corrective action costs under par. (a) were incurred prior to January 1, 2004, the total amount paid under par. (a) may not exceed \$297,750.

(c) If more than \$3,000 of the eligible corrective action costs under par. (a) were incurred prior to January 1, 2004, the total amount paid under par. (a) may not exceed \$317,600 or the sum of the following, whichever amount is less:

1. Eighty percent of the eligible corrective action costs incurred prior to January 1, 2004 that exceed \$3,000.

2. Seventy-five percent of the difference between \$400,000 and the eligible corrective action costs incurred prior to January 1, 2004.

(2) DIFFERENT REIMBURSEMENT FORMULA FOR SOME PERSONS. (a) Except as provided in subs. (3) through (6), the department shall reimburse a responsible person for each discharge site an amount equal to 75% of the eligible corrective action costs that are greater than \$7,500 and less than \$400,000 if any of the following apply at the time the discharge occurs or is discovered:

1. The responsible person is required to be licensed under ss. 94.67 to 94.71, Stats.

2. The responsible person employs more than 25 persons.

3. The responsible person has gross annual sales of more than \$2,500,000.

1 (b) To the amount under par. (a) the department shall add interest costs under s.
2 ATCP 35.25.

3 (c) If no more than \$7,500 of the eligible corrective action costs under par. (a)
4 were incurred prior to January 1, 2004, the total amount paid under pars. (a) and (b) may
5 not exceed \$294,375.

6 (d) If more than \$7,500 of the eligible corrective action costs under par. (a) were
7 incurred prior to January 1, 2004, the total amount paid under pars. (a) and (b) may not
8 exceed \$314,000 or the sum of the following, whichever amount is less:

9 1. Eighty percent of the eligible corrective action costs incurred prior to January
10 1, 2004 that exceed \$7,500.

11 2. Seventy-five percent of the difference between \$400,000 and the eligible
12 corrective action costs incurred prior to January 1, 2004.

13 **SECTION 13.** ATCP 35.22(4)(c) and (d) are renumbered (b) and (c).

14 **SECTION 14.** ATCP 35.22(5) and (6) are created to read:

15 ATCP 35.22(5) CORRECTIVE ACTION COSTS INCURRED PRIOR TO JANUARY 1, 2004.

16 For eligible corrective action costs incurred prior to January 1, 2004, the applicable
17 reimbursement rate under subs. (1) and (2) is 80%, rather than 75%.

18 (6) REDUCED REIMBURSEMENT RATE FOR REPEAT DISCHARGES. The department
19 may reduce the applicable reimbursement rate under this section, if a reduction is
20 appropriate under s. ATCP 35.08(6).

21 **SECTION 15.** ATCP 35.28 is repealed and recreated to read:

22 **ATCP 35.28 Reimbursement payments.** The department shall reimburse

1 responsible persons for approved corrective action costs, in the total amount approved for
2 each corrective action under s. ATCP 35.08 (4)(c), in the order in which the department
3 receives complete reimbursement applications from those responsible persons. The
4 department shall make payments under this section from the appropriations under ss.
5 20.115 (7)(e) and (wm), Stats. Notwithstanding any other provision of this chapter,
6 payment is subject to the availability of funds in those appropriations.

7 **EFFECTIVE DATE.** The rules contained in this order shall take effect on the first
8 day of the month following publication in the Wisconsin administrative register, as
9 provided under s. 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____

STATE OF WISCONSIN,
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen, Secretary